

Findings of Fact

1. On June 4, 2009, the Maryland State Highway Administration (SHA) issued a certain Request for Proposals (RFP) to secure the services of a qualified vendor to implement a new automated hauling permit system to enable motor carriers required to secure SHA special hauling permits to access electronic credit card and e-check processing capability consistent to interface with SHA's existing Automated Hauling Permit System (AHPS) and other applicable systems.
2. The top of the cover page of the subject RFP notified potential bidders in bold print of a pre-proposal date of June 22, 2009, an inquiry due date of June 26, 2009 and a proposal due date of July 20, 2009. (Ex. 1, page 1.)
3. The new computer billing and payment capability desired by SHA to expand available methods to charge motor carriers for hauling permits is envisioned to take effect without cost to the State but instead, through a negotiated price arrangement by which SHA will authorize the contract awardee to charge an approved service fee to private customers of SHA seeking the issuance of a hauling permit.
4. It may be fairly estimated from the volume of permits approved in the recent past and expected in the near future that SHA may issue close to 200,000 hauling permits annually and secure revenue in excess of \$10 million per year during each of the five (5) years of the term of the prospective contract for which proposals were solicited.
5. SHA is justifiably deeply concerned about the fiscal and operational viability and reliability of the contract awardee to perform all contractual obligations without fail during the duration of the contract in order to avoid federally established prohibitions against the interruption of transport of interstate commerce through Maryland, as well as securing the ease, timeliness, and accuracy of

private motor carriers' ability to make payments to SHA for the cost of obtaining hauling permits.

6. Appellant Kinsail Corporation (Kinsail) is a small business founded by Tim Keough (Keough) in 2008 which currently has eight (8) employees, which Keough boasts as representing a 200% increase in the number of employees it had when it submitted its proposal to SHA last year in response to the subject RFP when Kinsail had been in business for only a year and a half. Ex. 4; Tr. pg. 10.
7. Kinsail submitted a timely proposal in response to the RFP, though no representative of Kinsail attended the pre-proposal conference and Kinsail did not raise any question concerning the RFP at any time prior to the inquiry deadline of June 26, 2009 or the proposal due date of July 20, 2009.
8. Sec. I-G of the RFP stated specifically, "Each offeror is responsible for carefully reading and understanding the full terms and conditions of this RFP. Any offeror finding any discrepancy in, or omission from, the RFP or in doubt as to the meaning *shall* direct written questions or request for clarification to the attention of the Procurement Officer." (Emphasis supplied). Ex. 1, pg. 3.
9. Sec. II-D of the RFP provided: "The State reserves the right to accept or reject any or all Proposals, in whole or in part, received in response to this RFP, to waive or permit correction of minor irregularities, in any manner necessary, to serve the best interest of the State of Maryland." Ex. 1, pg. 5.
10. The immediately subsequent sentence in the RFP stated: "Discussions may be conducted with those responsible offerors that submit proposals initially judged to be reasonably susceptible of being selected for award."
11. Sec. IX-C of the RFP stated, "The MDOT may hold discussions with all Offerors judged reasonably susceptible of being

selected for award, or potentially so. However, MDOT also reserves the right to make an award without holding discussions. In either case of holding discussions or not doing so, the MDOT may determine an Offeror to be not responsible and/or not reasonably susceptible of being selected for award, at any time after the initial closing date for receipt of proposals and the review of those proposals." Ex. 1, pg. 15.

12. Sec. III-E of the RFP was entitled "**SCOPE OF CONTRACTOR SERVICES**" and opened with the following paragraph: "Each offeror must provide documentation in its Technical Proposal which will be sufficient to satisfy the State that the offeror has the financial resources; the management background and experience; the technical competence; at least five (5) years of recent experience in credit card processing, testing, user training, and implementation of systems similar to that required herein..." Ex. 1, pg. 10.
13. Following the introductory paragraph set forth above from the Scope Section of the RFP, Sec. III-E-2, entitled "**Fiscal Integrity**," further provided that "The offeror must include in their proposal a commonly accepted method to prove its fiscal integrity. Some acceptable methods include, *but are not limited to*, one or more of the following: a. Dunn and Bradstreet Rating; b. Standard and Poor's Rating; c. Recently audited (*or best available*) financial statements; d. Lines of credit; e. Evidence of a successful financial track record; f. Evidence of adequate working capital." (Emphasis supplied.) Ex. 1, pg. 11.
14. Sec. VI of the RFP was entitled "**TECHNICAL PROPOSAL CONTENT**" and stated in Sec. VI-B-7(d), "The offeror shall submit the Technical Proposal in seven (7) distinct sections as follows:...Financial Capability and Insurance - The Contractor *shall* include in the Technical Proposal a Section

which includes: "...A copy of the last two-(2) years *audited* financial statements." (Emphasis supplied.) Ex. 1, pgs. 12-14.

15. Kinsail responded to the RFP by providing to SHA all six (6) of the first six (6) of the specified requirements of the Technical Proposal, but did not provide SHA with two (2) years of audited financial statements as mandated by the 7th specification, in part because Kinsail had been in business for less than two (2) years and also because it did not have its financial statements audited. Tr. pgs. 39-43.
16. Kinsail did provide to SHA one and one half (1-1/2) years of unaudited financial statements, for which Kinsail reflected an operating loss in its first year of business and a profit during the first part of its second year of operation.
17. Per request of SHA, on September 15, 2009 Kinsail made an oral presentation to SHA in support of its proposal. Ex. 8.
18. Prior to the September 15, 2009 oral presentation, SHA sent to Kinsail a list of eight (8) questions that SHA sought for Kinsail to address at the oral presentation, none of which addressed Kinsail's fiscal integrity or financial capability, but instead concerned various aspects of Kinsail's computer billing system processes and mechanisms. Ex. 9.
19. On or about October 28, 2009, SHA notified Kinsail that it was "nearing the end of our evaluation process" and sought a 90-day extension of Kinsail's proposal in order to finalize contract selection, and in response to that request, Kinsail consented to the extension. Ex. 10.
20. On December 11, 2009, SHA requested additional information from Kinsail pertaining to SHA's evaluation of Kinsail's financial capability to perform the contract, consisting of nine (9) specific questions or requests for documentation

- including: "2. Was Kinsail's Income Statement and Balance Sheet as of 6/3/09 audited? If yes, please provide a copy of the independent auditor's report." Ex. 2.
21. On December 16, 2009, Kinsail responded to the foregoing question stating, "The financial statements were prepared by an independent accountant that Kinsail uses for accounting, however, it was not audited separately." Ex. 3.
 22. Several of the other items requested of Kinsail by SHA on December 11, 2009 besides No. 2 also pertained to financial capability but not to matters ordinarily contained in an audited financial statement, causing Kinsail reasonably to believe that SHA was not solely concerned about an audit, but also interested in learning other factors about Kinsail's fiscal status.
 23. Except as set forth in the requirements specified by the RFP for all Technical Proposals, and despite multiple inquiries on other particular indicia of financial capability, prior to SHA's determination to reject Kinsail's proposal as not reasonably susceptible for award, SHA did not specifically ask Kinsail to provide two (2) years of audited financial statements.
 24. By telephone call on December 22, 2009, SHA advised Kinsail that SHA had concerns about Kinsail's financial capability and that it would be in Kinsail's interest to withdraw its proposal from further consideration rather than to have SHA conclude its evaluation with a finding that Kinsail was not reasonably susceptible for award.
 25. In an effort to allay SHA concerns, demonstrate sufficient financial capability, and renew SHA evaluation of Kinsail's proposal, Kinsail sent a follow-up communication to SHA on on the same date as the aforementioned telephone discussion, in which Kinsail offered to post a performance or surety bond; but SHA rejected that offer because no performance or

surety bond had been included in the RFP (as SHA had deemed a bond unsuitable for the project) and therefore now feared such a late inclusion or allowance of a performance bond at the request of a single bidder would possibly necessitate reissuance of the RFP.

26. By correspondence dated January 21, 2010, SHA notified Kinsail that its proposal was deemed "not reasonably susceptible of being selected for award" and was therefore being removed from further consideration without having its Technical Proposal ranked and without opening its Financial Proposal. Ex. 5.
27. At the present time, because of the pendency of this appeal, no Financial Proposal from any bidder has been opened to be viewed and evaluated by SHA, as this procurement has been placed on hold while the parties and the other bidders await disposition of the instant bid protest.
28. In its January 21, 2010 rejection letter to Kinsail, SHA referenced the requirement for proposers to submit "two (2) years of audited financial statements" in order to demonstrate "financial solvency, capability and integrity" and the rationale for SHA's determination to reject Kinsail from further consideration was expressed as follows: "SHA has made this determination based on Kinsail Corporation's failure to include required information concerning financial capability and fiscal integrity." Ex. 5.
29. By correspondence dated January 26, 2010, Kinsail protested SHA's determination that Kinsail was not reasonably susceptible of being selected for award and in that letter Kinsail asserted that the RFP "clearly contains inconsistent information" concerning whether or not the submission of two (2) years of audited financial statements was required, or waived, or merely one of several options for SHA to consider

and evaluate to be certain of the financial solvency of proposers. Ex. 6.

30. By correspondence dated February 25, 2010, SHA issued a Final Decision denying Kinsail's protest, which was appealed to the Maryland State Board of Contract Appeals (Board) on March 4, 2010 and for which dispositive hearing was conducted on August 17, 2010.

Decision

Before the Board can fairly evaluate and resolve the questions raised by this bid protest, it is necessary first to identify the legal issue at the core of the dispute. Kinsail objects to SHA's determination that Kinsail is not reasonably susceptible of being selected for award. That much is undisputed, but beyond that there exists a rather severe contrast between the parties' perceptions concerning the lawfulness and propriety of this procurement. Even the basis of Kinsail's rejection is subject to opposing interpretation. Appellant contends that the evidence shows that Kinsail was wrongly rejected because SHA deemed its proposal to be non-responsive in that it failed to include two (2) years of audited financial statements. SHA asserts that the reason for Kinsail's rejection was not on the basis of non-responsiveness, but instead upon SHA's finding that Kinsail was not a responsible bidder.

The Code of Maryland Regulations (COMAR) 21.01.02.01 includes the following definitions:

"(77) 'Responsible' means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance.

(78) 'Responsive' means a bid submitted in response to an invitation for bids that conforms in all material respects to the requirements contained in the invitation for bids."

The distinction between these two terms of art in the law of government contracts is an important one and one which has been discussed at length in other Board opinions. See Covington Machine & Welding Co., MSBCA 2051, 5 MSBCA ¶436 (1998), Independent Testing Agency, Inc., MSBCA 1833, 4 MSBCA ¶369 (1994), Cam Construction Co. of MD, Inc., MSBCA 1393, 2 MSBCA ¶195 (1988), H. A. Harris Co., Inc., MSBCA 1392, 2 MSBCA ¶193 (1988), Control Systems Svcs., Inc., MSBCA 1397, 2 MSBCA ¶189 (1988), National Elevator Co., Inc., MSBCA 1329, 2 MSBCA ¶160 (1987), Roofers, Inc., MSBCA 1284, 2 MSBCA ¶133 (1986), National Elevator Co., MSBCA 1201, 2 MSBCA ¶115 (1985), National Elevator Co., MSBCA 1252, 2 MSBCA ¶114 (1985), Construction Mgmt. Assoc., Inc., MSBCA 1238, 1 MSBCA ¶108 (1985), Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA ¶82 (1984).

Essentially, a bid can be rejected as non-responsive if the bid does not comply with the requirements set forth in the specifications of a procurement solicitation. On the other hand, a bid can also be rejected by the State even though it is in all aspects completely responsive to bid requirements, but the bidder itself is deemed by the State to be insufficiently responsible to live up to its promised commitments and actually perform the terms of the contract. To sum, "responsive" goes to the bid, while "responsible" goes to the bidder.

Naturally, bidders seek to avoid failure of contract eligibility on the basis of either determination, but being deemed not reasonably responsible to be awarded a contract is more serious and damaging to a bidder because that determination pertains to the adequacy of the bidder itself rather than the completeness of a particular bid. In this bid evaluation, SHA attempted in good faith to avoid making a derogatory finding that Kinsail lacked fiscal integrity or financial capability, but despite warnings from SHA of that possibility unless its bid was withdrawn, Kinsail remains confident that it is a responsible

bidder entitled to have its Technical Proposal ranked and its Financial Proposal reviewed.

In the January 21, 2010 rejection letter to Kinsail, SHA expressly criticized Kinsail's failure to include in its proposal two (2) years of audited financial statements as required by the RFP, and SHA generally explained its rationale for the bid rejection decision as Kinsail's failure to include required information concerning financial capability and fiscal integrity. It is not surprising, therefore, that appellant views the State's rejection of its bid as being the result of a determination of non-responsiveness. As a consequence, Kinsail's approach by the evidence and argument put forth in its protest is to refute that putative determination and demonstrate that its bid was fully responsive. Kinsail contends that the stated requirement of providing two (2) years of audited financial statements in truth is really just a red herring used as a ruse by SHA improperly to justify SHA's rejection of Kinsail's bid.

In this regard Kinsail asserts the existence of an ambiguity in the bid documents, which in order for appellant to prevail, Kinsail must next establish that that ambiguity not only existed but was latent rather than patent. A long line of procurement authority in Maryland and elsewhere has supported the doctrine that patent ambiguities must be resolved prior to bid submission and opening. See Harbor Construction, Inc., MSBCA 2015, 5 MSBCA ¶439 (1998), David Bramble, Inc., MSBCA 1853, 5 MSBCA ¶389 (1996), John C. Grimberg Co., Inc., MSBCA 1761, 4 MSBCA ¶371 (1989), Helmut Guenschel, Inc., MSBCA 1439, 3 MSBCA ¶211 (1989), Cherry Hill Construction, Inc., MSBCA 1313, 2 MSBCA ¶172 (1988), Rice Corp., MSBCA 1301, 2 MSBCA ¶167 (1987), Dr. Adolph Baer, et al., MSBCA 1285, 2 MSBCA ¶146 (1987), Hanks Contracting, Inc., MSBCA 1212, 1 MSBCA ¶110 (1985), American Bldg. Contractors, Inc., MSBCA 1125, 1 MSBCA ¶104 (1985). By contrast, latent ambiguities are by nature hidden at the time that bids are due

and therefore may be raised by protest whenever they may ultimately become apparent. See Barton Malow Co., MSBCA 2568, _____ MSBCA ¶_____ (2008), Jackson R. Bell, Inc., MSBCA 1851, 5 MSBCA ¶392 (1996), Colt Insulation, Inc., MSBCA 1426 & 1446, 3 ¶231 (1989), Paul J. Vignola Electric Co., Inc., MSBCA 1226, 2 MSBCA ¶120-1 (1986).

Kinsail also argues that beyond the inconsistency in the procurement documents concerning the requirement of submitting audited financial statements for the prior two (2) years, even if such a requirement existed, it was waived by SHA due to several factors, as waiver was permitted by Sec. II-D of the RFP. For example, claims Kinsail, SHA never even requested two (2) years of audited financial statements and fully evaluated its proposal over a period of six (6) months without ever requiring the same. If SHA really wanted so badly for Kinsail's financial statements to be audited, wouldn't SHA have simply said so? Portions of the RFP itself expressly contemplated and referenced submission not only of audited financial statements, but "best available" financial statements, and that was only one of several specified examples of ways for bidders to document fiscal fitness.

Furthermore, argues Kinsail, because SHA conducted extensive discussions with Kinsail pursuant to RFP Sec. II-D and COMAR 21.05.03.03, SHA is in effect estopped from now claiming that Kinsail is not a qualified offeror, because discussions were permitted only with qualified offerors. The Board does not adopt this final argument which is contrary to the language in the RFP set forth in Sec. IX-C, expressly allowing discussions with any offeror potentially eligible for award. Notwithstanding COMAR 21.05.03.03, the Board views SHA's discussions with Kinsail as appropriate to evaluate Kinsail and its proposal.

The Board must side with Kinsail, however, on the balance of appellant's evidence and argument in support of its position that SHA may have been capricious with respect to a determination that

Kinsail's bid was non-responsive. The allegation of a fatal deficiency in Kinsail's failure to provide two (2) years of audited financial statements is indeed a red herring. It is clear from the evidence adduced that this was never a significant factor in the course of SHA's considerations and also that that requirement as stated in Sec. VI-B-7 may have been waived.

Unfortunately for Kinsail, though, none of the foregoing is pertinent to the instant appeal. Despite the somewhat tortured language in SHA's bid rejection giving Kinsail the impression that its bid was being rejected because it was non-responsive, in fact, SHA rejected Kinsail's bid because SHA determined that Kinsail itself was not a responsible bidder. It would be pointless therefore for the Board to determine whether an ambiguity existed here and if so, whether it may have been patent or latent, nor to address the various other sound arguments put forward by Kinsail to establish that its bid was responsive. As a matter of law, the responsiveness of the Kinsail bid is not a proper issue at all in this proceeding. Only those matters material to the question of whether Kinsail was a responsible bidder are pertinent to this protest.

Plainly, the State was interested in Kinsail's technical processes for facilitating contract implementation. But after completing that component of the evaluation, SHA became quite concerned about Kinsail's brief existence and therefore its prospective future financial viability, stability and reliability during the five (5) year term of this contract. At the time of its bid, Kinsail had been in business for less than two (2) years. During the procurement process Kinsail may have indeed experienced explosive growth, but that entailed what might be fairly considered as growing from a tiny business to a small business. In its first year of operation, representing two-thirds (2/3) of the history of the corporation, Kinsail

experienced a net operating loss, and though this is not unusual for a brand new company, it surely raised concerns at SHA.

Worsening its potential for a favorable financial evaluation, Kinsail lacked any rating at all from Dunn and Bradstreet or from Standard and Poors (S&P). Much of Kinsail's reliance in support of its claim of fiscal solvency, reliability, and security is a purported loan agreement from the corporate principal to his corporation, but that loan is subject to limitation, withdrawal or expiration at any time at the sole whim of Kinsail's founder and majority owner. In short, at the time of its proposal, Kinsail lacked the ability to provide to SHA sufficient assurance of sound financial standing to qualify as a responsible bidder. SHA's conclusion in this regard is not arbitrary or capricious. It is fully supported by the above noted deficiencies in Kinsail's submissions, which reasonably established Kinsail's inability to provide adequate proof of fiscal reliability. This caused SHA to determine Kinsail to lack fiscal integrity and financial capability, and that decision is reasonably grounded upon conclusions reached by SHA concerning Kinsail's responsibility, not responsiveness, though of course that decision is based upon the totality of the responses submitted to SHA by Kinsail during the procurement process.

While it may be unfortunate that the RFP here at issue used inconsistent language without adequate definition of key operative terms like "fiscal integrity" and "financial capability," at least to some considerable extent such characteristics should not be rigidly defined but instead deliberately left to be pliable to the circumstances that are exigent among competing bidders. Though the State might have elected in this procurement to limit bidding only to firms that could document certain multi-million dollar long-term historic gross or net revenues, for example, it was not incumbent upon SHA to do so, and in this procurement SHA's decision not to adopt

such rigorous or specific standards allowed Kinsail at least to submit a bid which might otherwise have been forbidden. To the extent that Kinsail now seeks to suggest or require refinement, clarification, or imposition of such standards, it is reminded that such questions could have been posited at the pre-proposal conference (if Kinsail had chosen to send a representative to that meeting) and in any event such matters should have been raised prior to bid opening. At the same time, the Board rejects SHA's related argument that Kinsail's entire bid protest is untimely and barred by COMAR 21.10.02.03.

For the reasons stated above and particularly because SHA reasonably determined that Kinsail is not a responsible bidder, appellant's objection to its bid rejection are insufficient to warrant that relief be afforded.

Wherefore it is Ordered this _____ day of August, 2010 that the above-captioned appeal is DISMISSED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

Ann Marie Doory
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2697, appeal of Kinsail Corporation under SHA Contract No. MCD-CC-2009.

Dated:

Michael L. Carnahan
Deputy Clerk